SUPREME COURT, U. S.

No. 878

DEC 4 1967

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

Scott's, Inc.,

Petitioner

v.

National Labor Relations Board

and

International Union of Electrical, Radio & Machine Workers, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John W. Cummiskey
James L. Snyder
Gordon J. Quist
405 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502

Attorneys for Petitioner

Of Counsel:

Miller, Johnson, Snell & Cummiskey
405 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan

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IN THE SUPREME COURT OF THE UNITED STATES

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No. ------

SCOTT'S, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Scott's, Inc. petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit enforcing, as modified, the order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ....., 66 LRRM 2081 (D.C. Cir. 1967). It is reproduced in Appendix A to this petition. That portion of the decree

for which Petitioner seeks review is reproduced in Appendix B to this petition. The National Labor Relations Board's Decision and Order (J.A. 663-687) is reported at 159 NLRB No. 146 (Unbound, 1966), 62 LRRM 1543 (1966) and is reproduced as Appendix C to this petition. The Decision of the Trial Examiner is in the Joint Appendix at 596-662.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1964).

QUESTIONS PRESENTED

The principal question presented for review is whether the National Labor Relations Board, after finding an employer has violated the National Labor Relations Act during an election campaign, has the power to order the employer (a) to make available to a labor union, suitable facilities at its plants for a one hour meeting at each plant so that the Union may present its views to the employees assembled on employer time; and (b) to grant the Union reasonable access for a three-month period to the employer's bulletin boards.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The relevant provision of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.* (herein called "the Act") is as follows:

National Labor Relations Act, Section 10(c), 29 U.S.C. Sec. 160(c):

> ... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging

in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

U. S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. The Facts

The International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter called "the Union") began an organizing campaign among the production and maintenance employees at all three of the plants of Scott's, Inc. in early March, 1964. These plants are located in western Michigan, two in Holland, Michigan, a community of approximately 25,000, and the third in Douglas, Michigan, a smaller community twelve miles south of Holland. At the time the organizing drive began, the two Holland plants employed approximately 160 persons, while a like number were employed at the Douglas plant. The Holland plants were primarily buffing and polishing shops for die cast automotive trim parts. The Douglas plant, in addition to the buffing and polishing, also cast the parts and performed the various machining and finishing operations on parts used primarily in television sets and small appliances.

In late March the Union completed a card signing program and sent a telegram to Scott's notifying it that the Union represented a majority of Scott's employees in a corporate-wide three plant bargaining unit and requesting collective bargaining negotiations.

Immediately thereafter, the Union filed a representation petition requesting an election under Section 9(c) of the Act. After lengthy representation hearings concerning the appropriate bargaining unit, the Board's Regional Director, in August, 1964, issued a decision upholding the Company's position that two separate bargaining units were the only units appropriate, one for the Douglas plant and one for the two Holland plants. At the same time the Board scheduled elections which were to be held September 10, 1964. On September 3, the General Counsel of the National Labor Relations Board issued a complaint in Case No. 7-CA-4743 upon charges filed by the Union against the Company, and at the same time the Union filed a request with the Board to proceed with the elections scheduled for September 10, 1964. The Union, however, just prior to September 10, withdrew its request to proceed, thereby blocking the scheduled elections.

The Union, in the unfair labor practice charges, contended that the Company had discharged, laid off, or transferred some employees in violation of Sections 8(a)(1) and (3) of the Act. Seven employees, according to the Union, had been discharged because of their Union activity. The Trial Examiner found that only three of the seven employees had been discharged because of union activity (J.A. 620-656). The Union also charged and the Trial Examiner found that Scott's, Inc. had questioned employees about their union activity, made promises of benefits, and threats of reprisal (J.A. 598-614). Additionally, a wage increase was found to be discriminatorily motivated and an employees' committee employer dominated (J.A. 614-619).

Subsequent to the first hearing, an amended complaint was issued charging the Company with a violation of Section 8(a) (5) of the Act for refusing to bargain with the Union. This amended complaint was withdrawn, however, when testimony at the subsequent hearing showed that a number of Union authorization cards had not been signed by the person whose alleged signature appeared thereon (J.A. 591-595).

The Board, on appeal by both sides, upheld the Section 8(a)(1), (2), (3) and (4) findings and overruled the Trial

Examiner on two of the four discharges which the Trial Examiner had found to be nondiscriminatory. In addition to the usual Board order requiring back pay and notice posting, the Board materially changed the Trial Examiner's proposed order (J.A. 658-660) and additionally ordered Scott's to take four further affirmative steps: (1) to mail to each of its employees a copy of the notice; (2) to convene during working time meetings of all employees and read them a copy of the notice; (3) to give the Union access to Company bulletin boards for a three-month period; and (4) to make available the Company's premises to the Union for a one hour speech by the Union to all assembled employees during working time (App. C, p. 39).

B. The Decision of the Court of Appeals

Pursuant to Section 10(f) of the Act, both the employer and the Union petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Board's Decision and Order. The Court of Appeals, while modifying the Order in part, substantially upheld the Board position. The Court of Appeals, on the issues relating to the discharges, had "considerable reservations as to the findings," (App. A, p. 13) but affirmed the Board because the court could not say there was "no evidentiary support for the Board's finding." *Ibid.*

Of the four remedies added to the Trial Examiner's proposed order by the Board, the court approved three. The requirement that a Company official read the Board notice to employees was denied enforcement as "incompatible with the democratic principles of the dignity of man."[1] (App. A, p. 15).

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[1] The court referred to both *NLRB v. Laney and Duke Storage Co.*, 369 F.2d 859 (5th Cir. 1966) and *J. P. Steven and Co. v. NLRB*, 380 F.2d 292 (2nd Cir. 1967). In *Laney and Duke* such a requirement was stricken down because it was unnecessarily embarrassing and humiliating to management while in *J. P. Stevens* the court gave the company the alternative of having a Board Agent read the notice. The Court of Appeals in this case in denying the remedy found that the public reading would not only be humiliating and degrading, but that it would undoubtedly have a lingering effect on future relations between the Company and the Union.

Of the remaining three remedies, Petitioner does not seek review of that part of the Board order which requires that the NLRB notices be mailed to each employee. Petitioner does, however, seek review both of the remedy giving the Union access for three months to Company bulletin boards which was affirmed by the court without comment, and that part of the remedy which required the Company to give access for one hour on Company time and at Company expense to the Union to allow it to give a presentation of the Union position, which was admitted by the court to be an "unusual" order. The court, in discussing this last aspect of the remedy, also referred to *NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223 (6th Cir. 1967), but, unlike that case where this remedy was denied, the Court of Appeals approved the remedy because of what it considered to be "aggravated circumstances."

REASONS FOR GRANTING THE WRIT

1. The question as to whether the National Labor Relations Board, ostensibly to "effectuate the policies of the Act," can order an employer found violating the Act during an election campaign, to pay for, house, and assure attendance for a union organizational meeting and to provide the Union with space to disseminate its arguments raises important questions under the National Labor Relations Act and the due process clause which have not but should be settled by this Court.

The Board and court below have ordered this employer-petitioner, Scott's, Inc., to grant the International Union of Electrical, Radio and Machine Workers a one hour meeting on company time in each of two plants and use of the Company bulletin boards for three months. The meetings, at which the Union could disseminate whatever argument it desired, would be during working hours, Company assembled, Company housed, and Company paid for. These affirmative actions have been called "fairly strong medicine." *NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223, 224 (6th Cir. 1967). They were called "unusual" by the court below. (App. A, p. 14). The Board itself called its remedy "something more than the usual remedial action."

(App. C, p. 34). The court below is the first court to have sustained the Board's imposing these harsh affirmative remedies.

Neither the Board nor the court below discussed or found that the Union had no alternative means of reasonable access to the employees, nor did they balance the property rights of the employer-petitioner against the right of the employees to organize. Such findings and balancings are certainly necessary before the Board, if it has such power at all, can order access to the employees at the real and immediate expense of the employer. *"Cf.," Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956); *NLRB v. United Steelworkers,* 357 U.S. 357 (1958); See, Bok, *Regulating NLRA Election Tactics,* 78 Harv. L. Rev. 38 n. 174 (1964).

These new remedies constitute a bold attempt by the Board to aid one party which the Board deems injured by an unfair labor practice in an election campaign. The Board is trying to even things up or, as the Board says, "to correct an imbalance." (App. C, p. 36). This Court has never decided under what circumstances, if any, an employer may be ordered to advertise, house, finance and assure attendance for a union's organizational meeting or to provide bulletin boards for a union. This Court has always recognized an employer's property rights and is even reluctant to permit a technical trespass on an employer's property. *NLRB v. United Steelworkers,* 357 U.S. 357 (1958).

Scott's, Inc. submits that the remedies ordered in this case are much more than a trespass upon its property. The remedies, especially the Company paid union meeting, are clearly significant and detrimental financially and discipline wise. These remedies constitute a taking of a substantial amount of Scott's, Inc.'s property, not to assure compliance with the National Labor Relations Act, but to assist the Union. As a result, these remedies are punitive and not remedial. See, *Consolidated Edison Co., v. NLRB,* 305 U.S. 197 (1938). Nor did the Board even attempt to lessen the punitive nature of its order by having the Union hold its one hour meeting during non-work

and non-paid for time. Holding the meeting on Company time violates the rule that "working time is for work." See, *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 n. 10 (1945). As stated above, the remedies are based upon inadequate findings and also are a taking of the petitioner's property without due process of law.

2. The decision of the court below is in conflict with a decision of the Court of Appeals for the Second Circuit: *J.P. Stevens & Co. v. NLRB,* 380 F.2d 292 (2d Cir. 1967). In *J. P. Stevens* the Court of Appeals sustained the Board's findings that, during a union campaign, the employer followed a pattern of interference, restraint and coercion of its employees by means of discriminatory discharges, notices, letters and discipline. In characterizing the employer, J. P. Stevens Co., the Court of Appeals for the Second Circuit said:

> There is no room for doubt of the Board's ultimate conclusion:
>
> [The Company], through its plant superintendents, acting in collaboration, initiated and pursued a pattern of conduct the purpose of which was to crush the union movement. With scant regard for the means employed other than their effectiveness, it interfered with, restrained and coerced its employees in the exercise of their rights under the Act, flagrantly, cynically, and unlawfully. 380 F.2d at 301.

Yet, the Court of Appeals held that the Board's granting the uncertified Union access to company bulletin boards was not a proper remedy:

> Finally, we must consider the provision giving the Union access to the Company's bulletin boards. The Union has not achieved majority status and the Board declined to find that but for the Company's conduct it would have. No unique problem of access has been shown as there was in NLRB v. S & H Grossinger's Inc., 372 F.2d 26, 64 LRRM 2295 (2d Cir. 1967), where no effective alternatives to access to employees on company premises were available to the union in its organi-

> zational efforts. The other authorities cited by the Board for this provision are equally distinguishable. For example, Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 62 LRRM 2415 (2d Cir. 1966), permitted access to company premises because that was the only way properly to judge a time study. Here the Board made virtually no findings concerning the issues relevant to solicitation, and made no adequate showing that the Company's bulletin boards are necessary to the Union in its organizational campaign. Under these circumstances, we do not think that the Company should be forced to make them available. 380 F.2d at 305.

Not only did the court below allow the Union access to company bulletin boards for a three-month period, but it did so without once even mentioning this aspect of the remedy in its opinion. The court, even though it specifically reviewed the other facets of the "unusual" remedies ordered by the Board, and in spite of the fact that it was in effect fashioning a remedy directly contrary to the one fashioned by the Second Circuit in *J. P. Stevens,* never once mentioned or alluded to the bulletin board remedy in its opinion. The decision stands on this aspect of the remedy completely contrary to the decision of the Second Circuit.

Scott's, Inc. is far less flagrant a violator of the Act than J. P. Stevens was found to be. While Scott's was not found to be blameless by the Board, they were found to have unlawfully discharged only five employees of some 320 employed, and of these five, the Trial Examiner, who heard the witnesses testify, had found that two of those were discharged for just cause. Even the court below indicated the discharges posed very close questions when it said, "While we have considerable reservations as to the findings on the issue relating to the discharges, we cannot say that they are irrational or lacking in some evidentiary support." (App. A, p. 13).

The taking of company property so that the Union can deliver a one hour speech on company time and company premises is an even more serious deprivation of an em-

ployer's property interests than is the use of his bulletin boards. It is clear that had the Second Circuit been faced with the question of the Union speech on company time and premises rather than just the use of the bulletin boards, it would have struck down the more harsh remedy just as it did the less harsh remedy.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CUMMISKEY
JAMES L. STOKES
GORDON J. QUIST
465 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502

Attorneys for Petitioner

Of Counsel:

MILLER, JOHNSON, SNELL & CUMMISKEY
465 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,302

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

SCOTT'S, INC.,
Intervenor.

No. 20,346

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SCOTT'S, INC.,
Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Intervenor.

On Petitions to Review and Enforce an Order of the National Labor Relations Board

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Decided September 6, 1967

Before BURGER, WRIGHT and TAMM, *Circuit Judges.*

TAMM, *Circuit Judge*: The International Union of Electrical, Radio and Machine Workers, AFL-CIO, has peti-

tioned this court for review of an order of the National Labor Relations Board issued on June 30, 1966, 159 NLRB No. 146. The order arises out of various charges of unfair labor practices filed by the Union with the Board against Scott's, Inc. No. 20,302 is a petition by the Union alleging that the Board erred in not giving the full measure of relief requested by the Union. No. 20,346 is the Board's petition for enforcement of its order against respondent employer.

The charges of unfair labor practices relate to the Union's attempts, in the early part of March 1964, to organize respondent's employees. The Board, in examining the ensuing trial examiner's report, found that the respondent had engaged in extensive violations of sections 8(a)(1), (2), and (3) of the Act[1] during the course of the respondent's anti-union campaign, including interrogation of employees concerning their interest and activity in the Union, threats of loss of jobs and existing benefits, coercion of employees to signify their opposition to the Union, and promises of benefits for the rejection of the Union. The Board, after due and proper proceedings adopted the findings, conclusions, and recommendations of the trial examiner with certain additions and modifications; made findings; rendered a decision; and entered a cease and desist order. In so doing, the Board reversed the trial examiner on several of his findings. We are satisfied that where the Board reached a result different from that of the trial examiner[2] such result was proper. *Universal Camera v. N.L.R.B.*, 340 U.S. 474 (1951).

We, upon the whole record, consider significant for purposes of discussion only the remedy proposed by the Board. We need not concern ourselves with the rest of the Board's findings, because they are based on substantial evidence on the record considered as a whole and because

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[1] 29 U.S.C. 158(a) (1), (2), (3) (1964).

[2] The Board may, of course, reject findings of the trial examiner, and ordinarily this prerogative will not be disturbed on judicial review. Wheeler v. N.L.R.B., 114 U.S. App. D.C. 255, 314 F.2d 260 (1963).

the relevant evidence was such that a reasonable mind might accept it as adequate to support the Board's conclusions. *Washington, Virginia & Maryland Coach Co. v. N.L.R.B.*, 301 U.S. 142 (1937); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1958). While we have considerable reservations as to the findings on the issue relating to the discharges, we cannot say that they are irrational or lacking in some evidentiary support. We therefore affirm as to this issue and all other issues except the remedy, as to which issue some modification is called for.

The Remedy

The remedy which the Board petitions this court to enforce; *id est*, the requirement of a public reading of the cease and desist order by the employer to the employees on company time, must be re-evaluated in light of its unusual nature. This remedy was not in the proposed order of the trial examiner but was added by the Board. We are well aware of the remedial aspects of the remedies as required by the Act and of the Board's duty, broad discretion, and expertise in fashioning remedies in individual cases.[3] The remedies fixed by the Board derive from a long history of bad relations between the Union and the company. Company attitudes were reflected in speeches critical of the Union. The Board found the company exceeded permissible bounds and found an unfair labor practice in the speeches. Amongst the approved remedies are the requirements that the employer mail to each employee the notice which informs the employee of his statutory right to be free from coercion, interference, and restraint,

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[3] When the Board finds an unfair labor practice to have been committed, section 10(c) of the Act authorizes it "to take such affirmative action including reinstatement of employees with or without backpay as will effectuate the policies of this Act." This power, as has been recently emphasized, is a "broad discretionary one subject to limited review," and its exercise is not to be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to 'effectuate the policies' of the Act." (Citations omitted.) Local 57, International Ladies' Garment Workers Union v. N.L.R.B., ___ U.S. App. D.C. ___, 374 F.2d 295 (1967), *cert. denied*, 35 U.S.L.W. 3426 (U.S. June 6, 1967).

and to post copies of this same notice.[4] The Board would also have us enforce yet a fourth promulgation of the order by having the employer read to groups of employees, convened during working hours, a copy of this same notice which has been posted and mailed. We reject this as being inappropriate to achieve the sought-after goal of dissemination of information concerning employees' rights.[5] We recognize the broad scope of discretion Congress has given the Board in fashioning remedies; however, that discretion is not without limits. *Local 57, International Garment Workers Union v. Garwin*, ...U.S. App. D.C. ...., 374 F.2d 295 (1967), *cert. denied*, 35 U.S.L.W. 3426 (U.S. June 6, 1967). The public reading by the employer of the

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[4] The Board's order also required the company to give access for one hour on company time and at company expense to the Union to allow it to give a presentation of the Union position. The granting of such a remedy is of course unusual, and as the court said in N.L.R.B. v. H.W. Elson Bottling Co., ---F.2d ---, decided June 27, 1967, No. 17089, Sixth Circuit, is "fairly strong medicine." The aggravated circumstances there mentioned but not present are found here; therefore, such a remedy is approved.

[5] This same remedy was before the court in N.L.R.B. v. Laney and Duke Storage Co., 359 F.2d 859 (5th Cir. 1966) and was there rejected. The court said, at page 869: "The requirement of the Recommended Order that the notice be read by management to any employee who requests it, as amended by the Board to require it to be read to each employee, singly or collectively, is unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act."

Recently, this same remedy was before the Second Circuit in the *J. P. Stevens* case. (J.P. Stevens and Co. v. N.L.R.B., --- F2d ---, Nos. 30914, 30391, decided July 7, 1967.) While recognizing the humiliating aspect of such a forced reading, that Circuit attempted to alleviate the indignity by giving the company the choice of reading the notice or having a representative of the Board read it to the employees. This procedure, however, creates a problem more severe than the one it supposedly solves. The practical effect of the exercise of the option is to put the imprimatur of the Board on both a particular union's activities, as well as on union activities in general, by having a representative of the Board read a notice resulting from unfair labor practices which arose because of, and from, company activity in opposition to a union's organizational activities. It follows, then, that the Board is in the position of not being completely neutral, although that is the position which the Board is legally duty bound to take. Further, we would not, sua sponte, offer as an alternative to the employer a choice between a company or a Board representative giving the public reading; such a de novo remedy would run counter to the premise that remedies should be worked out by those having the most experience and expertise in the area. Our review function may in a rare case as here require us to forbid a particular remedy as illegal, arbitrary, or capricious, but it does not authorize us to *prescribe* a remedy as the Second Circuit has done. (It should be noted that in the *Garwin* case, *supra*, note 3, this court suggested areas of remedies which might properly be considered by the Board, but we did not presume to *prescribe* a remedy.) Secondly, the clear import of the alternative's exercise would be to put the Board on the horns of a dilemma; for, if the employer elects not to read the notice, the Board must appear, through a representative, and create an appearance of sanctioning one particular union. Further, in this case the record estab-

order would, further, be humiliating and degrading to the employer[6] and undoubtedly would have a lingering effect on future relations between the company and the Union. It could as well have an impact on the atmosphere, not only at the time of the reading, but in the future, for peaceful, fruitful, and effective labor bargaining. It is conceivable that some conduct on the part of an employer or a union might reach such extreme dimensions as to justify the novel and drastic step of requiring the offending party to stand up before the employees and read the Board's notice publicly, but we cannot close our eyes to the reality that such a course would inevitably poison the future relations between company and union and be a source of continuing resentment. The ignominy of a forced public reading and a "confession of sins" by any employer, any employee, or any union representative makes such a remedy incompatible with the democratic principles of the dignity of man.

In No. 20,302 the Board's order, with the exception of the reading of the cease and desist order by the company to the employees, is affirmed.

In No. 20,346, the Board's order, with the exception of the reading of the cease and desist order by the company to the employees, is enforced.

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lishes that the original election was postponed indefinitely, and those cases requiring that so-called laboratory conditions be maintained during the pendency of an election clearly apply in this case. In N.L.R.B. v. Fresh'nd-Aire Co., 226 F.2d 737 (7th Cir. 1955), the Board itself set aside an election where, prior to the election, a field examiner of the Board had appeared at an organization meeting of the union and a trial examiner had played a piano at a union social gathering. Board involvement in a reading of the order would inescapably draw the Board into the very conflict areas it should remain aloof from, except for the need to judge. Moreover, that role is an activity which would, by the Board's standards, vitiate the pending election. We do not accept the argument that because of the employer's own activities he finds himself in a position of making a choice and therefore cannot complain about the impact. Labor relations is not a game of Russian roulette.

[6] The court in the Laney and Duke case did not, nor need we now, go on to the problems which would arise if such a remedy were allowed. Traditionally the courts have been reluctant to grant remedies, the essential nature of which is a personal act and where the problems of enforcement and interpretation are considerable.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: I agree with the majority insofar as it upholds the Board's findings that the employer engaged in extensive violations of employee rights under the National Labor Relations Act, and insofar as it enforces the remedies worked out by the Board to overcome the adverse effects of these violations.[1] I cannot agree, however, that requiring the employer to read the cease and desist order is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964); *Local 57, International Ladies' Garment Workers Union v. N.L.R.B.*, ... U.S. App. D.C. ...., ..., 374 F.2d 295, 300, *cert. denied*, 387 U.S. 942 (1967). Any difficulties such a provision might be thought to create seem to me adequately dissipated by the modification approved by the Second Circuit in *J. P. Stevens & Co. v. N.L.R.B.*, ... F.2d .... (Nos. 30914 and 30391, July 7, 1967), in which the company was allowed the alternative of having a Board representative read the order.

I am not persuaded that having a Board official read a Board order which does nothing more than assure the employees that their rights under the NLRA will no longer be violated, as the Board has found they have been heretofore, places the Board's "imprimatur" on the union and thus makes the Board less than neutral. The fact is that this employer has acted unlawfully and adequate remedies are needed to restore the balance.[2] If it is thought that a court's modification of the Board's order "would run counter to the premise that remedies should be worked out by those having the most experience and expertise in the area," then the appropriate course would

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[1] This includes the approval of the order to grant the union access to company property, for the reasons noted in Note 4 of the majority opinion.

[2] *See* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 124-141 (1964); Ross, *Analysis of Administrative Process Under Taft Hartley*, 63 LAB. REL. REP. 132, 153 (BNA 1966); Note, *The Need for Creative Orders Under Section 10(e) of the National Labor Relations Act*, 112 U. PA. L. REV. 69, 81-83, 90-94 (1963).

be to remand this part of the order to the Board for its further consideration in light of *J. P. Stevens* rather than to reject it absolutely.[3]

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[3] It should be noted that, after analyzing unfair labor practice cases over a five-year period, Professor Philip Ross of the University of Pittsburgh's Graduate School of Business recommended as one important method of expunging "the effects of the unfair labor practices and [restoring] the parties as much as possible to their positions prior to the violation" the remedy approved in *J. P. Stevens*. Ross, *supra* Note 2.

APPENDIX B

On consideration whereof, it is ORDERED, ADJUDGED, AND DECREED by the United States Court of Appeals for the District of Columbia Circuit that Scott's, Inc., its officers, agents, successors, and assigns, shall:

• • •

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

• • •

(f) Upon request of the Union made within 1 month of this Decree, immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted.

• • •

(g) Upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decree, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on Company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants.

APPENDIX C

159 NLRB No. 146

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCOTT'S, INC.

and

Cases Nos. 7-CA-4743
7-CA-4743(2)

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

and

EMPLOYEES' COMMITTEE of SCOTT'S, INC.

Party in Interest

DECISION AND ORDER

On November 23, 1965, Trial Examiner John H. Eadie issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that these allegations of the complaint be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs, the Respondent filed a brief in re-

ply to the General Counsel's brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed a brief in answer to the cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[1] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this consolidated proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

1. As described more fully in the Trial Examiner's Decision, in March 1964, International Union of Electrical, Radio and Machine Workers, AFL-CIO, (hereinafter called the Union) commenced an organizing campaign among the employees at Respondent's two plants in Holland, Michigan and at its plant in Douglas, Michigan. Almost immediately thereafter, and for a period of about four months, the Respondent embarked upon a vigorous campaign in opposition to the Union. The Trial Examiner found, and we agree, that the Respondent engaged in extensive violations of Section 8(a)(1) of the Act during the course of this anti-union campaign, including interrogation of employees concerning their interest and activity in the Union, threats of loss of jobs and existing benefits, coercion of employees to signify their opposition to the Union, and promises of benefits for rejection of the Union. However, in addition to the violations of Section 8 (a)(1) found by the Trial Examiner, we find that the Respondent also violated Section 8(a)(1) in the following two respects.

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[1] We hereby correct the inadvertent error in Section D. 7 of the Trial Examiner's Decision. Employee Bolles was discharged on May 14 and not on July 14, 1964, as stated at one point by the Trial Examiner.

(a) Willis Vandenberg is in charge of labor relations for the Respondent and is also a Vice-President of Crampton Manufacturing Company, of which the Respondent is a subsidiary.[2] During April and May 1964, Vandenberg made speeches to assembled employees at Respondent's three plants. According to several employees, whose testimony is reported at length by the Trial Examiner, Vandenberg spoke of the movement of work away from Grand Rapids Brass, another subsidiary of Crampton, to the Respondent's plants after a union won bargaining rights at Grand Rapids Brass. Thus, employee Bolles testified that Vandenberg said that at Grand Rapids Brass, "they had twelve hundred people working there when he first started and they had a union and now that they have the union there were about four hundred working there now," and that "they found they could do their jobs cheaper here than in Grand Rapids . . . ." Employee Thomas testified that Vandenberg spoke to employees about the piece-work rates provided for in the contract at Grand Rapids Brass and said "That's where we got our work from. They don't have piece work any more. Union shops don't have piece work." Thomas testified further that Vandenberg said that "if we're going to have to pay higher wages down here why can't we just keep it all in Grand Rapids?" According to the testimony of employees, Vandenberg also referred to improvements in terms and conditions of employment that had been instituted at other plants in the Crampton chain where the unions had not been able to organize the employees, and that if the Union did win at the Respondent's plants, there would be new work rules and stricter enforcement of existing plant rules. Employee witnesses also testified that Vandenbreg remarked that if the Union got in, the Respondent might have to hire Negroes. Also, according to employee witnesses, Vandenberg stated that at Crampton employees discovered how they could achieve their goals with a committee instead of paying dues to a Union, and the "committee"

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[2] Crampton, which is a subsidiary of Gulf and Western, Inc., has as subsidiaries the Respondent; Grand Rapids Brass, discussed below; and several other companies.

was still operating at a Crampton plant although the "Labor Board had made them post notices apologizing for the committee and other things they had done .... They slapped our hands, just like we were naughty little children. They just don't label it a committee any more."

Vandenberg's testimony, also quoted at length by the Trial Examiner, does not specifically deny any of the foregoing testimony by employees, except for the allegations about race. Vandenberg admitted that he made statements regarding the loss of jobs at the plant where a Union won bargaining rights, but said that he made it clear that the work was removed from the plant for economic reasons.

Without making any credibility findings, the Trial Examiner found that Vandenberg's speeches were not violative of the Act. However, the foregoing testimony by employees regarding Vandenberg's speeches was, except as noted above, not denied by Vandenberg, not contradicted by other testimony, and not discredited by the Trial Examiner, and we credit it. On the basis of this evidence, we find that Vandenberg's speeches violated Section 8(a)(1) of the Act. The thrust of Vandenberg's remarks was that employees would lose their jobs or would be penalized if the Union won bargaining rights at the Respondent's plants. Thus, Vandenberg's statements that there would be new work rules and strict enforcement of existing rules if the Union came into the plant constituted a direct threat of reprisal; and his comments concerning the transfer of work and the concomitant loss of jobs after the organization of the Grand Rapids Brass plant constituted an implied threat that the Respondent would follow the same course of action at this plant if the Union won. We further find that Vandenberg's statement that in an earlier proceeding at Crampton the Board "slapped our hands just like we were naughty little children" and that the committee was still operating but was not called a "committee" would clearly convey to employees the idea that the guarantees of the Act could be circumvented with impunity. This statement, we find, cast Board protection

of employee statutory rights into disrepute and thus clearly violated Section 8(a)(1) of the Act.

(b) In disagreement with the Trial Examiner, we also find that the Respondent violated Section 8(a)(1) of the Act by granting to employees a general wage increase of 5 cents an hour on September 28, 1964.

As noted, in March 1964, the Union commenced its organizing campaign and during the ensuing several months the Respondent committed extensive violations of Section 8(a)(1). On March 30, 1964, the Union filed a petition seeking to represent the employees in Respondent's plants and in June 1964, when the Union filed the charges in the instant case, it also filed a request to proceed with the election in the representation proceeding. Following issuance of a Decision and Direction of Election on August 3, an election was scheduled for September 10. However, before September 10, the Union asked to withdraw the request to proceed and the Regional Director notified the parties the election was being postponed indefinitely. On September 28, the wage increase was granted.

The Respondent sought to justify the timing of the wage increase on the grounds that it was granted as part of the regular periodic review of working conditions at the Respondent's plants, that it had withheld the increase because of the pending election but decided to announce the increase when it appeared the election would not be held in the near future. However, this explanation is refuted in part by the Respondent's own records, which show that since 1957 the Respondent had made periodic adjustments in wage rates at approximately 2-year intervals, and that it had most recently increased wages on December 30, 1963, only 9 months prior to the September 1964 increase, which the Respondent suggests was a delayed increase.[3] Nor is it material that the Respondent did not grant the wage increase until after the Union had withdrawn its request to proceed with the election. In the first place, the representation proceeding was still pending when the

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[3] *Western Saw Manufacturers, Inc.*, 155 NLRB No. 131.

increase was granted. In any event, at the time, the Union was still engaged in organizing the plant and the increase, even if it would not interfere with an election would tend to interfere with the Union's organizing campaign.[4] Indeed, the Respondent, in letters to employees announcing the wage increases, referred to "trouble from the outsiders" and announced that it was considering other benefits to be given "as soon as our problem with the outsiders is behind us." This statement made it plain that the Respondent granted the wage increase in order to interfere with the Union's organizing campaign.[5]

2. The Trial Examiner found and we agree, that the Employees' Committee was a creature of the Respondent and that the Respondent violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of this committee.

3. The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Hoggard, Smith, and Bolles; by laying off employees Bounds, Collins, Hiscock, Cecil Herrell, and Smith; and by transferring employees Cecil Herrell and Childress from one job to another. The Trial Examiner also found, and we agree, that the Respondent did not violate Section 8(a)(3) and (1) by discharging employee Noblin; by laying off employee Smith for a third time on June 9, 1964; and by transferring employees Charles Herrell and Thomas. We also agree with the Trial Examiner, for the reasons stated below, that the Respondent violated Section 8(a)(3) by laying off employee Jimmerson, but did not violate the Act by constructively discharging him. Contrary to the Trial Examiner, however, we find, for the reasons stated below, that Respondent further violated Section 8(a)(3) and (1) of the Act by dis-

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[4] *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405.

[5] The complaint alleges that the Respondent committed other unfair labor practices in violation of Section 8(a)(1) in addition to those found herein and the General Counsel and the Union filed exceptions to the Trial Examiner's failure to find such violations. However, we find it unnecessary to consider or pass on such incidents and shall make no additional findings regarding these allegations, as in our opinion such findings would merely be cumulative and would not affect the remedy.

charging employees Swain and Acklin, by laying off employee Clifford Harmsen, and by refusing to transfer employee Thomas back to her previous job.

In considering the allegations that the Respondent violated 8(a)(3), it is essential that we keep in mind the larger context of the Respondent's union *animus*. Thus, as we have already noted, soon after the Union commenced its organizing campaign, the Respondent for a period of about four months engaged in extensive violations of Section 8(a)(1). We note particularly that according to the undenied testimony of employees, President Scott remarked to several employees that "You guys are going to eat them [union] badges before this is through;" that "we are going to get rid of all you badge toters, sooner or later, it is only a matter of time . . .;" that "those boys wearing the badges" would be discharged; that "If the Union got in" the badge wearers would be looking for jobs "a year from now"; and that he told employee Jessie Smith that button-wearers Bound, Collins, Cecil Herrell, and Tillery would be discharged. Also, when employees sought explanations why they were being laid off out of seniority, Scott replied that seniority did not mean anything "any more," that he would show the employees "a thing or two before this was all over" and that "we are at war and we have to fight fire with fire." Further, as we have already found, Supervisor Vandenberg made speeches threatening employees with reprisals if the Union came into the plant, and the Respondent unlawfully increased employee wages in order to interfere with the Union organizing campaign.

That these statements were not idle threats is amply borne out by the widespread discriminatory activity carried out by the Respondent against Union supporters. Thus, we have found that the Respondent engaged in various forms of conduct violative of Section 8(a)(3) against a large number of employees. All of these employees discriminated against had signed Union cards, were leaders in the organizing campaign, and wore badges identifying themselves as Union members. Further, most of these employees were members of the Union organizing committee and openly distributed Union leaflets on one or more occasions at

the Respondent's plant. Although union *animus* is properly a consideration in determining motive for an employer's actions against his employees, it is equally clear that an employee's participation in an organizing campaign will not shield him from disciplinary action that is justfiied by misconduct on his part. With these considerations in mind, we turn to an examination of specific instances of the Respondent's allegedly discriminatory conduct.

(a) *James Swain*

Swain was known to be an active member of the Union's organizing committee, and he appeared on behalf of the Union at the representation hearings in April 1964. In the middle of April, the Respondent's President, Scott, saw Swain wearing a Union badge and told him that he was in "trouble" and that "if you get a Union in here and we give you a job that you can't run we can say out, and out you are, out the door." Also in April, Becksvoort, Swain's supervisor, told Swain that if employees would forget about the Union the Respondent would "come up with some kind of better way of treating their employees." The Trial Examiner found, and we agree, that the statements of Scott and Becksvoort violated Section 8(a)(1).

Prior to leaving for his scheduled vacation beginning May 4, Swain asked his supervisor, Britton, for permission to extend his vacation an additional 4½ days, but Britton denied the request on the ground that Swain was needed at the plant. Nevertheless, Swain did not report for work for the second half of the shift on May 11, when he was due to return, nor did he report for work on May 12. When Swain returned on May 13, foreman Britton merely gave him a warning notice for his May 12 "absence without calling in," excused his absence of May 11, and allowed him to return to work except for a brief disciplinary layoff because he had received more than three warning slips in a short period. On May 14, despite Britton's action Respondent discharged Swain by sending him a telegram stating he was discharged "because you did not return to work at once when your vacation was over."

The Trial Examiner found that the Respondent's discharge of Swain did not violate Section 8(a)(3). Although acknowledging that Respondent was lax in enforcing its rules before the advent of the Union and that it became strict after the Union campaign started, that the record was replete with evidence of union *animus*, that Swain was a leading adherent of the Union, and that the Respondent's foreman "generally" makes the decision to discharge an employee but that in Swain's case Becksvoort, the supervisor, changed Swain's disciplinary layoff to a discharge without consulting the foreman, the Trial Examiner found that Swain was discharged for failing to notify the Respondent of his absence on May 12. The Trial Examiner also referred to the facts that Swain had a poor attendance record during 1963, that he had been absent from work several times during 1964, and that he had falsified his piece count.

It is clear that the Trial Examiner's findings relating to Swain's misconduct prior to May 1964, are irrelevant since Becksvoort, who, as noted decided to discharge Swain, testified without contradiction that Swain was discharged because he returned late from his vacation without notifying the Respondent, and the telegram on May 14, informing Swain of his discharge, referred only to his late return from his vacation. Indeed, the fact that prior to the advent of the Union the Respondent tolerated Swain's shortcomings as an employee would, if anything, tend to support the conclusion that the Respondent's discharge of Swain was not, as claimed, because he returned late from vacation, but rather because the Respondent meanwhile had learned of Swain's Union activity.

The sole issue before us, therefore, is whether Swain's late return from his vacation was the real reason for his discharge. Becksvoort testified that there was a "plant rule" that "anyone that doesn't return when vacation time is up without notifying the company would be a discharge [sic]." However, the record contains no testimony other than Becksvoort's self-serving declaration regarding such a plant rule and there was no evidence that anyone other than Swain had been discharged for violating such rule. On the contrary, employee Horne testified

without contradiction that he had stayed away several additional weeks after his 1964 vacation without being disciplined, and he testified about other employees who, like Swain, stayed away from work although told they could not do so, and who were not disciplined. Employee Lipe also testified that she regularly took extra time off after her vacation, and that she was not disciplined for doing so.

In view of the foregoing, particularly the important part played by Swain in one Union campaign, the Respondent's union *animus*, including the evidence that its enforcement of plant rules became stricter after the advent of the Union, and the fact that Swain was treated disparately, we find that the Respondent discharged Swain because of his Union activity, in violation of Section 8(a)(3) and (1).

(b) *Bill Acklin.* Acklin was also known to be an active member of the Union organizing committee. During the organizing campaign, supervisors Conway and Becksvoort told Acklin to take off his union button and throw it away because it would not do him any good. Acklin was absent from work from May 25 through May 27. When Acklin attempted to return to work, he was told that he did not have a job because of the Respondent's policy that anyone absent 3 consecutive days without notice was considered a "quit."

In finding that Respondent did not violate Section 8(a)(3) in discharging Acklin, the Trial Examiner relied on the Respondent's records which, according to the Trial Examiner, showed that 48 employees had quit their jobs during 1963 and 1964 and that the Respondent had refused to rehire them; and that "9 of these were employees whose employment was terminated 'as quits' after absences of 3 days." However, the record clearly does not support this finding. The documents relied upon show only that the 48 employees had quit; the documents do not indicate that any were terminated because of the 3-day rule allegedly in effect at the Respondent's plant. On the contrary, the record is replete with testimony concerning numerous instances of lengthy and unexplained absences by employees who were *not* terminated for that reason.

Thus, for example, employee Lipe testified that no "quit" rule existed at the plant and that she knew of no instance of an employee who had been refused permission to return to work after a 3-day absence.

In any event, even assuming that there existed a rule that employees absent for 3 days without notice would be terminated, the record shows that Acklin had given notice. Thus, Acklin testified without contradiction that on May 25, the first day of his absence, he told employee Tillery, with whom he normally rode to work, to inform supervisor Conway that Acklin would not be at work because he had to mind his children while his wife was sick, and that he could not call in peronally because he had no telephone. Tillery testified that he notified Conway that Acklin would be absent, and Conway admitted as much, although their testimony was in conflict as to what was actually said.

In view of the foregoing, particularly the Respondent's union *animus*, its knowledge of Acklin's extensive union activity, and the failure of the Respondent to rebut the General Counsel's *prima facie* case by showing that Acklin was discharged for cause, we find, contrary to the Trial Examiner, that the Respondent discharged Acklin because of his Union activity, in violation of Section 8(a)(3) and (1) of the Act.

(c) *Clifford Harmsen.* Although employee Harmsen was not active in the campaign, he had signed an authorization card. In April, Respondent's supervisor Becksvoort questioned him about his views on the Union and told him if the employees did not bring in the Union, the Respondent would be financially able to provide a retirement plan and better working conditions. The Trial Examiner found, and we agree, that this statement violated Section 8(a)(1). At about the same time, supervisor Reed asked Harmsen what he thought of the idea of a shop committee, and Harmsen replied that he thought a "good" committee would be all right. According to Reed, Harmsen also said that he was not for the Union, although some people thought he was. Sometime between May 7 and 14, after employee Earl Dean Smith was laid off for the first time, Harmsen spoke to supervisor Becksvoort, saying that Smith had been laid

off "kind of out of line." Becksvoort answered that "Seniority didn't mean a thing here, anymore" and that "anybody trying to run the shop can get laid off." In another talk with Becksvoort a few days later also on the subject of employees being laid off out of seniority, Becksvoort said, according to Harmsen, that "these guys just get in your hair, you have got to get them out of here," to which Harmsen replied "If I was laid off because of this I believe I would quit." Harmsen himself was laid off out of seniority on May 21.

The Trial Examiner found that the layoff of Harmsen did not violate Section 8(a)(3) because the General Counsel had failed to prove that the Respondent knew of his Union activity. However, in view of the repeated conversations between Harmsen and the Respondent's supervisors protesting other discriminatory lay offs it seems clear that, despite Harmsen's protestation, the Respondent arrived at the conclusion that Harmsen was a Union supporter and treated him in the same way as other pro-Union employees.

Harmsen's layoff, as noted, was not in accord with seniority. The Respondent claimed that it had not followed seniority in the past in making layoffs. However, while the Respondent's records show and there was some testimony that there had been instances in the past of employees being laid off out of line, the record indicates that such were the exception rather than the rule. Further, the Respondent's President Scott admitted that seniority did not mean anything "anymore."

In view of the foregoing, we find, contrary to the Trial Examiner, that Respondent violated Section 8(a)(3) by laying off Harmsen on May 21.

(d) *Kathryn Thomas.* The Trial Examiner found that the Respondent did not violate Section 8(a)(3) and (1) by transferring employee Thomas on April 28, 1964, from her job as highlighter to one in which she spent part of her time doing silk screening. The Trial Examiner found the transfer was made in response to Thomas' request in January 1964 that she be transferred to another job be-

cause of a personal conflict with another employee. We agree with this conclusion. However, we find that the Respondent's refusal to transfer Thomas back to her old job on her request was because of her Union activity, in violation of Section 8(a)(3).

Thomas was a member of the Union's organizing committee, distributed Union literature, wore a committee button, attended the representation proceedings at the request of the Union, and attended a "training school" of the Union April 23-25. On May 8, Thomas asked foreman Jones why she was not back on her former job of highlighting, as she had requested and Jones replied, according to Thomas' undenied testimony, "I don't want you in there any more .... When we can get the turmoil settled around here — if we have a local or if we don't — I might put you back in there ...." On May 9, Thomas asked supervisor Roe the same question, and according to the unrefuted testimony of Thomas, Roes replied, "that's hard to say, ... we are on opposite sides of the fence ... I don't care whose toes I step on, and that includes you, too." Roe also told her that she was a "hard worker," but that she was "being stubborn," and he referred to her union button as "good advertising." On May 11, Thomas remarked to Roe that she was not wearing a union button at that time, but that she was still on a job other than highlighting. Roe replied, "I expected a change in heart. Not only in appearance ... you need not expect miracles overnight."

On the basis of the foregoing, particularly since the Respondent made it clear to Thomas that although she was originally transferred at her own request, its refusal to honor her further request that she return to her prior job was a reprisal for her Union activities, we find that its refusal to transfer Thomas back to her job in May 1964, violated Section 8(a)(3) and (1) of the Act.[6] However, as the record indicates that Thomas was returned to her

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[6] See *Vacuum Plating Corporation*, 155 NLRB No. 73.

former position on June 22, and that she suffered no financial detriment because of the Respondent's unlawful refusal to transfer her in May, we shall neither make any provision for backpay for Thomas, nor require that the Respondent reinstate her to the former position.

(e) *O. B. Jimmerson.* Jimmerson participated in the Union organizing campaign by wearing an organizing committee button and distributing union leaflets about three or four times. Jimmerson was laid off from June 22 until June 30, although about half the employees retained in his department had less seniority than he, and he was replaced during that time by a junior employee who had previously been making boxes and doing odd jobs. Jimmerson testified that he was told the reason for the layoff was lack of work. However, Jimmerson was laid off not according to seniority. The record indicates that prior to the advent of the Union, the Respondent generally followed seniority in making layoffs, and the Respondent's President Scott admitted to employees that seniority didn't mean anything "anymore." Jimmerson's layoff occurred during the course of a union organizing campaign that was being strongly resisted by the Respondent. Jimmerson, and others like him who were laid off, were leaders in the organizing effort with high seniority ranking, and these layoffs followed threats of reprisal against employees active in the Union. In view of the foregoing, we find, in agreement with the Trial Examiner, that Jimmerson was laid off not because of lack of work but rather because of his Union activtiy, in violation of Section 8 (a)(3) and (1) of the Act.

Soon after Jimmerson returned to work from his layoff, he was assigned to a job as polisher. This job was paid on an hourly basis of approximately $1.90 an hour, plus a piece-work basis, at a rate set by the Respondent. If a polisher produced the requisite number of pieces to meet the standard set by management, he would be paid an amount in addition to his hourly rate, so that he could normally earn approximately $3 an hour. Jimmerson and others had at various times in the past been assigned to

this particular job. When on July 8, Jimmerson complained to supervisor Reed that the rate was too low for that job and that "nobody in the shop . . could make out on it," Reed replied, according to Jimmerson's credited testimony, "You're going to make out on it like this . . . we're going to starve the union out." Jimmerson then said he was going to "quit" and Reed replied, "That's up to you. It would probably be the best." Jimmerson then punched out and left the premises.

We agree with the Trial Examiner that Jimmerson was not constructively discharged on July 8 because of his Union activity.[7] While supervisor Reed's statements that the Respondent would "starve the Union out," contained a threat of reprisal violative of Section 8(a)(1), this statement, standing alone, would not establish that Jimmerson was constructively discharged unless it was also shown that his assignment to this job was discriminatory. This was not shown. We shall therefore adopt the Trial Examiner's recommendation and dismiss this allegation of the amended complaint.

The Remedy

The Board has a particular duty under Section 10(c) of the Act to fashion remedies for the unfair labor practices committed and thus effectuate the policies of the Act.[8] We have found that the Respondent has engaged in a wide-ranging course of conduct that was admittedly calculated

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[7] Member Brown would reverse the Trial Examiner's conclusion and would find that Jimmerson was constructively discharged in violation of Section 8(a)(3). When Jimmerson complained about the inability of employees to "make out" on the work assigned, he was told "You're going to make out on it like this . . . we're going to starve the union out"; and when Jimmerson said he was going to quit, he was told "That's up to you. It would probably be the best." These comments can only mean that Respondent was assigning Union adherents to less lucrative tasks in the hope this would cause them to leave (i.e., the words "starve the union out" can carry no other implication) and that Respondent was pleased that Jimmerson was acting according to its plan.

[8] *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194; *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584; *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72; *N.L.R.B. v. Pacific Greyhound Lines*, 303 U.S. 372; *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261; *Williams Motors Co. v. N.L.R.B.*, 128 F.2d 960, 964-966 (C.A. 8).

to defeat the Union by all available means. In implementation of this program, the Respondent engaged in extensive interrogation, threats of reprisal, and promises of benefit, violative of Section 8(a)(1); it indicated its disregard of Board action protecting statutory rights, thus further violating Section 8(a)(1); and it discriminated against a large number of employees by discharge, layoff, or transfer because of their union activity, in violation of Section 8(a)(3). We find merit in the Union's contention that, under the circumstances of this case, the serious violations of the Act committed during its organizational campaign call for something more than the usual remedial action. It would be an anomaly to preclude an employer's benefiting from misconduct which destroys a union's majority[9] but to allow it to act with comparative impunity to prevent such majority status from ever being attained.

We are not, however, persuaded by the Union's argument that a bargaining order is warranted here. It is possible that but for the Respondent's unlawful conduct the Union might ultimately have attained majority status. However, the record before us does not contain proof that the Union ever had a majority in the appropriate unit. The Union filed charges alleging that the Respondent had unlawfully refused to bargain with it as majority representative of a unit of employees at the Respondent's two plants in Holland, Michigan. After an investigation, the General Counsel issued a complaint alleging, *inter alia*, that Respondent violated Section 8(a)(5) (Case No. 7-CA-4743(2)). During the course of the hearing the Respondent contended for the first time that the eligibility list it had earlier supplied to the General Counsel was inaccurate, as it had omitted the names of several employees who had been on layoff status or leave-of-absence status at the time. Also during the hearing, the General Counsel was unable to authenticate several authorization cards submitted by the Union. The General Counsel then moved to withdraw the Section 8(a)(5) allegation of th com-

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[9] *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702.

plaint on the ground that "at the time the Union demanded recognition and thereafter, it cannot be established that the Union represented a majority of the employees in the appropriate collective-bargaining unit." The Trial Examiner allowed time for the parties to file objections to the General Counsel's motion, and, after receiving no objections, he granted the motion. In view of these circumstances and in consideration of the majority principle in Section 9(a) of the Act, we are not convinced that the policies of the Act require or even permit the issuance of a bargaining order here.[10]

We have concluded, however, that the following would be appropriate as a remedy for the Respondent's massive and deliberate violations of the Act in this case. First, we think it appropriate that the Respondent inform each employee of his statutory right to be free from interference, coercion, and restrain. Therefore, we shall require the Respondent to mail to each of its employees a copy of the notice herein after the notice is signed by Respondent's representatives, in addition to posting copies thereof at all places in its plants where notices to employees are customarily posted. Also, to assure notification to employees of the Respondent's intent to remedy the unfair labor practices committed and to refrain from committing other unfair labor practices in the future, we shall require the Respondent to convene during working time meetings of employees in the various departments of the plants in Holland and Douglas, Michigan and read to them a copy of the attached notice.[11]

As Respondent violated the rights of those employees who had not yet had a chance to formulate their desires

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[10] *H. W. Elson Bottling Company*, 155 NLRB No. 63; *J. P. Stevens and Co., Inc.*, 157 NLRB No. 90. In view of this conclusion, the Respondent's motion to dismiss and Strike Cross-exception to Trial Examiner's Decision is hereby denied.

[11] The requirement that the Respondent mail copies of the Notice to all employees will insure that those employees not present when the notice is read during working hours will be adequately informed of the Respondent's intention to refrain from engaging in unfair labor practices. *H. W. Elson Bottling Company, supra; J. P. Stevens and Co., Inc., supra.*

with regard to representation as well as the rights of those who had done so, we deem it appropriate that employees be afforded further opportunity to engage in organizational efforts. To this end, we shall require that, upon request of the Union made within 1 month of this Decision, the Respondent immediately grant the Union and its representative reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted. Further, in order to redress the imbalance created by Respondent's action in delivering a coercive speech to its employees assembled on company time and premises, we shall require that the Union be given an opportunity to present its views under similar circumstances. Accordingly, we shall require that, upon request of the Union, Respondent shall make available to the Union and its representatives, at a mutually agreeable time within 3 months of the Decision, suitable facilities such as are customarily used for employee meetings so that the Union may speak to the employees assembled on company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Scott's, Inc., Holland, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their membership in or activities on behalf of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, or making threats of reprisal, or promises of benefit because of such activity, or coercing employees to signify their opposition to the Union.

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[12] *H. W. Elson Bottling Company, supra.*

(b) Granting wage increases to encourage employees to abandon the Union for bargaining purposes and to defeat the Union.

(c) Dominating or interfering with the administration of the Employees' Committee of Scott's, Inc., or dominating or interfering with the formation or administration of, or contributing financial or other support to, any other labor organization of its employees.

(d) Discouraging membership in the Union, or in any other labor organization of its employees, by discharging, laying off, transferring to lower-rated jobs, refusing to re-transfer to their former positions, or otherwise discriminating against employees in regard to their hire and tenure of employment or any term or condition of employment.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Offer Robert Hoggard, Earl Dean Smith, Bill Acklin, James Swain, and William Bolles immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights or privileges, and make them and Charles Bounds, Bobby Joe Collins, Cecil Herrell, Clifford Harmsen, O. B. Jimmerson, Richard Hiscock, and Arthur Childress whole

in the manner set forth in the section of the Trial Examiner's Decision entitled "The remedy".

(b) Notify Hoggard, Smith, Acklin, Swain, and Bolles, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Withhold all recognition from the Employees' Committee of Scott's, Inc., as the representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, and completely disestablish said organization, or any successor thereto, as such representative.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to anaylze the amount of backpay due under the terms of this Order.

(e) Mail a copy of the attached notice marked "Appendix"[13] to each employee, and post copies thereof at its plants in Holland and Douglas, Michigan. Copies of said notice, to be furnished by the Regional Director for Region 7, shall be signed by a representative of the Company. Thereafter, a copy shall be mailed to each of its employees by the Company, and additional copies shall be posted by it and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure

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[13] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals enforcing an Order".

that said notices are not altered, defaced, or covered by any other material.

(f) Upon request of the Union made within 1 month of this Decision, immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted.

(g) Convene during working time, by departments and by shifts, all its employees, and cause a responsible official of the Respondent, at Department Supervisor level or above, to read to the employees the contents of the attached Appendix.

(h) Upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decision, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on Company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants.

(i) Notify the Regional Director for Region 7, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it relates to the matters not found herein to be unlawful.

Dated, Washington, D.C. June 30, 1966.

Frank W. McCulloch,	Chairman
Gerald A. Brown,	Member
Sam Zagoria,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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No. 878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SCOTT'S, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents*.

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court below is officially reported in 383 F. 2d 230 and unofficially reported in 66 LRRM 2081 and in 56 LC ¶ 12,159. The decision and order of the National Labor Relations Board (J.A. 663-687) is officially reported in 159 NLRB 1795 and unofficially reported in 62 LRRM 1543 and in 1966 CCH NLRB ¶ 20,621.

JURISDICTION

The decree of the court below was entered on November 13, 1967. The petition for a writ of certiorari was filed on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Upon findings by the National Labor Relations Board that an employer has engaged in "deliberate and massive violations" of the National Labor Relations Act, numbering in all 27 separate independent violations of Section 8(a)(1) including interrogation and coercive captive audience speeches, 15 separate independent violations of Section 8(a)(3) including discharges, transfers and layoffs, and violations of Section 8(a)(2) by forming and dominating an employees' committee, whether the Board has the power to order the employer (a) to make available to the union suitable facilities, at each of its plants where the unfair labor practices occurred, for a one-hour meeting so that the union may present its views to the employees assembled on employer time; and (b) to grant the union reasonable access to the employer's bulletin boards for a three-month period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

"Sec. 10. * * *

* * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *"

STATEMENT OF THE CASE

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, began an organizing campaign among the theretofore unorganized production and maintenance employees at the two plants of Scott's Inc., located in Holland, Michigan and at its plant in Douglas, Michigan, in March 1964 (J.A. 663-664). During April and May 1964, the employees at each of these plants were assembled to hear speeches made to them on company time by Willis Vandenberg who is in charge of labor relations for Scott's and is also a Vice-President of Crampton Manufacturing Company, of which Scott's, Inc., is a subsidiary (J.A. 664). In each of these speeches Vice-President Vandenberg threatened employees with loss of jobs, transfer of work to other plants and new unfavorable working conditions if the Union succeeded in organizing Scott's (J.A. 664-666). Vice-President Vandenberg also told the employees that the parent corporation, Crampton, had an employees' committee still operating "although the 'Labor Board had made them post notices apologizing for the committee and other things they had done. . . . They slapped our hands just like we were naughty little children. They just don't label it a committee any more' " (J.A. 665). The Board found that these statements "clearly convey to employees the idea that the guarantees of the Act could be circumvented with im-

punity", and "cast Board protection of employee statutory rights into disrepute" (J.A. 665-666).

Will J. Scott, who is President of Scott's, Inc., during April 1964, spoke to a group of employees some of whom were wearing union buttons, stating, "You guys are going to eat them badges before this is through" (J.A. 599). To other employees President Scott variously made statements that if the Union came in the "first thing" that the Company would do would be to "cancel all holiday pay, vacation pay, insurance and seniority", that "everything would start from scratch", that if the Union negotiated, it would not "get very much" (J.A. 599), that "we are going to get rid of all you badge-toters, soon or later, it is only a matter of time . . . I could have . . . got rid of you but we didn't figure you'd give a damn" (J.A. 599-600), "those boys wearing the badges" would all discharged "at one time or another . . . just a matter of time" (J.A. 600), that seniority did not mean anything "anymore", that he was going to teach the Union adherents "a thing or two before this was all over" (J.A. 601), that it didn't look like seniority meant anything any more and that "if you boys are going to carry on like this . . . we are at war and we have to fight fire with fire" (J.A. 601).

In all, the Board found that Scott's, Inc., had engaged in 27 separate independent violations of Section 8(a)(1) of the Act, including interrogation, threats of reprisal and promises of benefit (J.A. 598-601, 611-614, 638, 643, 644, 654, 664-666), 15 separate violations of Section 8(a)(3) including discriminatory discharges, transfers and layoffs of union adherents (J.A. 624-628, 630-637, 642-651, 653, 668), and violations of Section 8(a)(2) by forming and dominating an em-

ployees' committee (J.A. 616-619, 668). The complaint alleged that the employer had committed other unfair labor practices but the Board did not rule on these since findings of additional unfair labor practices "would merely be cumulative and would not affect the remedy" (J.A. 668, fn. 5).

The Board determined that its order should include not only the usual cease and desist, reinstatement, back pay, and notice posting provisions but certain additional provisions designed to remedy the particular unfair labor practices involved. Insofar as here pertinent, the Board's decision explained the additional remedial provisions of its order as follows (J.A. 679-680):

> "We have concluded, however, that the following would be appropriate as a remedy for the Respondent's massive and deliberate violations of the Act in this case. * * *
>
> "As Respondent violated the rights of those employees who had not yet had a chance to formulate their desires with regard to representation as well as the rights of those who had done so, we deem it appropriate that employees be afforded further opportunity to engage in organizational efforts. To this end, we shall require that, upon request of the Union make within 1 month of this Decision, the Respondent immediately grant the Union and its representative reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted. Further, in order to redress the imbalance created by Respondent's action in delivering a coercive speech to its employees assembled on company time and premises, we shall require that the Union be given an opportunity to present its views under similar circumstances. Accordingly, we

shall require that, upon request of the Union, Respondent shall make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decision, suitable facilities such as are customarily used for employee meetings so that the Union may speak to the employees assembled on company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants.[12]

"[12] *H. W. Elson Bottling Company, supra.*"

The Board's order accordingly included the following provisions (J.A. 682-683):

"2. Take the following affirmative action which we find will effectuate the policies of the Act:"

* * *

"(f) Upon request of the Union made within 1 month of this Decision, immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted."

* * *

"(h) Upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decision, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on Company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants."

The United States Court of Appeals for the District of Columbia Circuit unanimously upheld all of the Board's findings of fact and unanimously enforced all the provisions of the Board's order except for one pro-

vision respecting reading of notices, which is not here material. With respect to the provisions of the order for the one hour speech on company time and property, the court distinguished the decision of *NLRB* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223 (6th Cir., 1967) where such an order was enforced but with modifications, as follows (Pet., p. 14, fn. 4):

> "The aggravated circumstances there mentioned but not present are found here; therefore, such a remedy is approved."

The decree entered by the court below includes the above quoted paragraph 2(f) and (g) with merely the change of the word Order each place it appeared to the word Decree (Pet. p. 18).

ARGUMENT

The issue of whether the Board has the power to remedy employer unfair labor practices by ordering an employer to grant the victimized union access to employees through use of plant bulletin boards and plant meeting facilities, is undoubtedly important. However, we believe that the power of the Board to provide these remedies is too clear to warrant review by this Court. There are no court decisions which question the Board's power to order such remedies in a situation where the nature of the employer unfair labor practices make these remedies particularly appropriate.

An order containing the same provision for use of bulletin boards was enforced by the United States Court of Appeals for the Sixth Circuit, without any discussion, in the case of *NLRB* v. *Elson Bottling Co.*, 379 F. 2d 223, 226 (6th Cir., 1967). In two cases, the

courts of appeals have enforced, as modified, orders for use of employer facilities for in-plant meetings on company time to be addressed by union representatives. In the first of these cases the Board made the provision of such a meeting operative only if the employer thereafter held a captive audience meeting. The court enforced with two modifications, one limiting this provision to the plant where the unfair labor practices had occurred and the other limiting this provision to the period preceding a scheduled Board election. *Montgomery Ward & Co.* v. *NLRB,* 339 F. 2d 889, 894-895 (6th Cir., 1965). In the second, where the Board order was not limited so as to apply only in the event the employer conducted captive audience meetings, the court modified to so limit the order. *NLRB* v. *Elson Bottling Co.,* 379 F. 2d 223, 226-227 (6th Cir., 1967). Here there have already been captive audience meetings at which the employer committed unfair labor practices. So the order here properly was enforced without any such modification.

The only case in which a use-of-the-bulletin-boards remedy was set aside is *J. P. Stevens & Co.* v. *NLRB,* 380 F. 2d 292 (2nd Cir., 1967), certiorari denied, December 11, 1967, No. 684, O.T., 1967. In that case the United States Court of Appeals for the Second Circuit did not suggest that the Board lacked power to remedy unfair labor practices by requiring an employer to accord the union the use of bulletin boards. Rather, the Court of Appeals for the Second Circuit explicitly based its decision on the absence in that case of any Board finding or showing as to the necessity of use of bulletin boards, stating: "Here the Board made virtually no findings concerning the issues relevant to solicitation, and made no adequate showing that the

company's bulletin boards are necessary to the union in its organizational campaign" (380 F. 2d at 305). Since that decision turns on the state of the evidence and findings, it constitutes no holding as to the power of the Board. Hence it presents no conflict as to the question presented by the petition for certiorari in this case.

Moreover, while the Board in the *J. P. Stevens* case (157 NLRB 869, 878) used the same terms to describe the unfair labor practices there involved as it used in the instant case, "massive and deliberate" (J.A. 679), the unfair labor practices in the *J. P. Stevens* case did differ from those present in the instant case in that the *J. P. Stevens* case included neither coercive captive audience speeches, nor oral speeches or statements by top corporate management. Employees of Scott's, Inc., were subjected to a barrage of oral statements in the plant during working hours by the president of the employer company and by the vice president of the parent corporation in an extensive propaganda campaign against the Union. The presence of such unfair labor practices in the case at bar made the remedies devised for these unfair labor practices peculiarly appropriate.

Here the Board found "an imbalance created by Respondent's action in delivering a coercive speech to its employees assembled on company time and premises" (J.A. 680). While this particular finding was made in relation to the offsetting of this "imbalance" by use of the captive audience for a Union conducted meeting (J.A. 680), the use of bulletin boards similarly is appropriate to offset the imbalance of daily oral anti-union statements to employees in the plant during

working hours by employer corporate officers, personnel director and supervisory employees.

The petitioner asserts (Pet. p. 7) that the Board was required to, and here had not, balanced property rights against the right to organize, as it had done in *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793 (1945); *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956) and *NLRB* v. *United Steelworkers,* 357 U.S. 357 (1958). Those cases all involved the issue of whether an employer committed an unfair labor practice by denying its facilities to a union. The cases did not involve any issue of the appropriate remedial order when an employer had committed the unfair labor practice of using its facilities for anti-union purposes. As the Board here found, it is the employer use of employer property and employer time for anti-union purposes which constitutes the unfair labor practice for which the Board must devise a remedy.

Once an employer has engaged in unfair labor practices in which the employer's president as well as corporate officials of its parent corporation commit themselves to defeat of the union, including captive audience speeches to all employees in which contempt for the National Labor Relations Board was expressly stated (J.A. 666), no amount of use of employer facilities by a union can overcome the fear of employer retaliation which employees feel. But use of company facilities can serve to counteract the employer unfair labor practices by providing the union with avenues of communication to employees which approximate the avenues of communication which the employer enjoys. There is no possible way for the union to reach all the employees in as all inclusive and effective way as the employer

has already reached these employees unless the union is permitted to use company facilities.

Any consideration of the other channels open to the Union shows how disparate is the opportunity for the Union to counteract employer unfair labor practices without using employer facilities. The fear of the employee that the employer will retaliate against him if he is seen accepting union literature at the gate or attending a union meeting can only be obviated by use of plant bulletin boards and meeting in the plant.

Aside from fear of employer reprisal if the employee voluntarily receives the union message, pressures of modern living make the likelihood of the union equalizing its ability to reach the employee remote. Handbill distribution at plant gates as a means of reaching employees suffers from the rushing of employees to get to work or to get home. Attendance at union meetings away from the plant on the employee's own time is usually low because of long hours of work, including travel to and from work and the demands on the nonworking time of employees. These demands are usually so great as to make attendance at union meetings, even where there is no fear of employer retaliation, possible only for a few of the employees except on rare occasions of great importance to employees such as ratifying a contract or calling a strike.[1] Unions do not have ac-

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[1] See Sebastian de Grazia, Of Time, Work and Leisure, 20th Century Fund (1962), who summarizes studies showing that "Since 1850 free time has not appreciably increased" (p. 90) and that "work time" "takes up an average of 10 hours and 40 minutes a day" when transportation to and from work is included, and on work days the worker has "time free" of "only about one hour" (p. 96). On the low attendance at union meetings not due to any antipathy to unions see Beverly Gilmer, Industrial Psychology, McGraw-Hill (1961) p. 232; *Local 171, Pulp and Paper Workers (Boise Cascade Corp.)*, 165 NLRB No. 97, 65 LRRM 1382 (1967).

cess to employees' addresses. But if instead of granting the use of employer bulletin boards and meeting rooms, the employer were required to supply a mailing list, a remedy we advocate and hope the Board will begin to adopt on a wide scale, still even such a remedy, helpful as it would be, would not equalize the opportunity for communication because "Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket", *NLRB* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (2d Cir. 1963), certiorari denied, 376 U.S. 951. Even if read, written matter is usually ineffective to offset completely oral employer communications.

Given these realities of present day employment relations, the Board's order was not only within its power but reasonable as a remedy for the unfair labor practices committed by Scott's, Inc.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent

January 2, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 878

SCOTT'S, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–17) is reported at 383 F. 2d 230. The Board's decision and order (Pet. App. 19–39; J.A. 597–662)[1] are reported at 159 NLRB 1795.

JURISDICTION

The decree of the court of appeals was entered on September 6, 1967. The petition for a writ of certiorari was filed on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to those portions of the record printed as a joint appendix in the court of appeals.

QUESTION PRESENTED

Whether, where an employer has committed a number of serious unfair labor practices, including subjecting its employees to coercive "captive audience" speeches, the National Labor Relations Board acted reasonably in ordering the employer to afford the union access to plant bulletin boards for three months, and to make available suitable facilities so that the union could present its views to the employees for one hour on company time.

STATUTE INVOLVED

The relevant portion of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151 *et seq.*) is set forth at pp. 2–3 of the petition.

STATEMENT

Petitioner company operates three plants in western Michigan which perform a variety of machining and finishing work. In early March 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO began an organizing campaign among petitioner's employees. Petitioner responded by engaging in a six-month anti-union campaign, in which it committed a series of unfair labor practices. Petitioner fired five employees for union activity, one of them a ten-year veteran and another with eight years' seniority. It discriminatorily laid off five other employees—one of them with nine years' seniority. With one exception, all of these employees were members of the union organizing committee (Pet. App. 24–32; J.A. 620–651).

Petitioner's officials—including its president and vice-president in charge of labor relations—repeatedly threatened employees with adverse consequences if they supported the Union. For example, President Scott told a group of employees wearing union buttons, "you guys are going to eat those badges before this is through," and told others that badge wearers would be fired (J.A. 599, 600–601). Superintendent Becksvoort told an employee, "go ahead and vote [for the union]; * * * they can't make us keep this place open and if you don't watch it you will be back in Arkansas picking cotton" (J.A. 614). Scott made a similar threat to various employees (J.A. 600).

Petitioner also indicated to employees that working conditions would worsen if they chose the Union. Scott, for example, told an employee that if the Union were voted in he would cancel all holiday pay, vacation pay, insurance, and seniority (J.A. 599). Labor Relations Vice-President Vandenberg, in one of a series of speeches which he delivered to employees assembled on company time, warned that if the Union came in there would be new work rules and stricter enforcement of existing ones. He added that, when the employees at another Crampton subsidiary[2] chose a union, the work force dropped from 1,200 to 400 and work was transferred from there to Scott's, and that the work might not be retained if the employees chose the Union (Pet. App. 21).

[2] Petitioner Scott's, Inc. is one of the subsidiaries of Crampton Manufacturing Co., which, in turn, is a subsidiary of Gulf and Western, Inc. (Pet. App. 21, n. 2).

In addition to the threats and discharges, petitioner's officials organized an employee "shop committee" to deal with management. Vandenberg urged the employees to utilize such a committee in one of his "captive audience" speeches, telling them a committee was still operating at a Crampton plant although the "Labor Board had made them post notices apologizing for the committee and other things they had done" (Pet. App. 21–22). He added that the Board "slapped our hands just like we were naughty little children [and now we] just don't label it a committee any more" (Pet. App. 22). Petitioner's foremen thereafter selected and solicited employees to represent various departments (J.A. 617–618). Vandenberg told the committee at its first meeting that its purpose was "to try and improve the conditions [in the plant] without the union," by taking up matters like pay rates (J.A. 617–618).

On September 28, despite the pendency of a Board representation proceeding,[3] petitioner announced a pay increase for its employees in letters stating, *inter alia*, that it was unfortunate that the Company had to "deal with the representation argument brought upon us by the outsiders that have been circling our plant for the past seven months or so" (J.A. 472). One of the letters promised that other benefits were being considered and would be forthcoming "as soon as [the] problem with the outsiders is behind us" (Pet. App. 24; J.A. 473).

[3] On March 30, the Union had filed a representation petition seeking an election among petitioner's employees (Pet. App. 23).

On these facts and the other evidence in the record,[4] the Board concluded that the Company had interrogated and threatened employees and promised them benefits in order to deter union organization, in violation of Section 8(a)(1) of the Act. It also found that the Company had interfered with and dominated the employees' committee, in violation of Section 8(a)(1) and (2), and that it had discharged and laid off employes for anti-union reasons, in violation of Section 8(a)(3) and (1) (Pet App. 20–32; J.A. 657–658).

In order to remedy these unfair labor practices, the Board issued an order with the usual cease-and-desist, notice-posting, and reinstatement-with-back-pay provisions (Pet. App. 36–39). In addition, the Board ordered the petitioner to: (1) mail each employee a copy of the notice; (2) convene the employees during working time to read them the contents of the notice; (3) grant the Union and its representatives reasonable access for a three-month period to the plant bulletin boards; and (4) make available to the Union or its representatives, at a mutually agreeable time, facilities for a one-hour meeting at each plant, so that the Union could present its views to the employees assembled on company time (Pet. App. 35–36, 38–39).

Upon review, the court of appeals held that the Board's unfair labor practice findings were supported

[4] Indeed, the incidents here described are merely illustrative of the unfair labor practices which petitioner's top officials and supervisors committed during the course of the Company's anti-union campaign. That conduct is discussed in fuller detail in the decisions of the Board and trial examiner (Pet. App. 19–33; J.A. 596–662).

by substantial evidence (Pet. App. 12–13). It enforced all the provisions of the Board's order except that requiring petitioner to read the contents of the notice to assembled employees (Pet. App. 13–15).[5]

ARGUMENT

1. Section 10(c) of the Act authorizes the Board, where an unfair labor practice has been found, to "take such affirmative action * * * as will effectuate the policies of the Act." This Court has repeatedly emphasized the Board's broad discretion in the formulation of remedial orders and the restraint that the courts of appeals are to exercise in reviewing Board orders. See *Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 82; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194–195; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346–347; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216. Cf. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621. Contrary to petitioner's contention (Pet. 7), the limited access to its premises which the Board directed the Company to afford the Union is a reasonable means of remedying the unfair labor practices here committed. Thus, petitioner had engaged, the Board found, in extensive

[5] Circuit Judge Wright (Pet. App. 16–17) would have enforced that provision of the order too, or, alternatively, would have remanded it to the Board for reconsideration in light of the modification made in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F. 2d 292, 304–305 (C.A. 2), certiorari denied, December 11, 1967, No. 684, this Term. The Board is not seeking certiorari on this issue.

unfair labor practices, including the delivery of coercive speeches to the employees on company time and premises,[6] and those unfair labor practices created an "imbalance" in the Union's opportunities for conveying its organizational message to the employees (Pet. App. 36). To give the Union access to plant bulletin boards for a three-month period, and a one-hour opportunity to reply on company time and premises to petitioner's "captive audience" speeches, no more than redresses the balance, by affording the Union the same access to the employees for the dissemination of its views as petitioner enjoyed when it engaged in its unlawful efforts to defeat the Union.

Nor was the Board's order invalid because the Board failed to make findings regarding the availability to the Union of alternative means of reaching the employees. Compare *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357. Those two cases, upon which petitioner relies (Pet. 7), considered the circumstances under which the Board could find a prohibition on distribu-

[6] The effectiveness of that anti-union weapon has repeatedly been recognized. See Note, 61 Yale L.J. 1066, 1074–1076, nn. 33–39 (1952); Note, 14 U. Chi. L. Rev. 104, 108–109 (1946); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Board*, 78 Harv. L. Rev. 38, 100–103 (1964). Cf. *Administration of the National Labor Relations Act*, Report of the Subcommittee on National Labor Relations Board, House Committee on Education and Labor, 87th Cong., 1st Sess., pp. 55–59 (1961).

tion of union literature and solicitation of union membership on an employer's premises to be an unfair labor practice; in that context, this Court stated the Board must make findings concerning alternative means of access available to the union, where non-employee organizers are involved. Here, however, the question is not the lawfulness of excluding union representatives from the premises, *ab initio,* but the scope of the Board's remedial authority with respect to unfair labor practices which have been established. Nothing in the cases relied on purports to deal with that problem. In any event, the Board expressly found that petitioner's unfair labor practices created an imbalance in the Union's organizational opportunities, requiring special access to obtain adequate redress (Pet. App. 36).

Finally, there is no substance to petitioner's contention (Pet. 7–8) that the Board's order is an unconstitutional invasion of property rights. This Court has held that the Fifth Amendment does not prohibit Board orders requiring, in appropriate circumstances, that an employer make its premises available for union organizational activity. *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U.S. 226, 232; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 802, n. 8.[7] As the Court said in *Republic Aviation,* "Inconvenience, or even some disloca-

[7] See also *Montgomery Ward & Co.* v. *National Labor Relations Board,* 339 F. 2d 889, 894–895 (C.A. 6); *National Labor Relations Board* v. *S & H Grossinger's Inc.,* 372 F. 2d 26 (C.A. 2); *National Labor Relations Board* v. *Cities Service Oil Co.,* 122 F. 2d 149 (C.A. 2).

tion of property rights, may be necessary in order to safeguard the right to collective bargaining" (324 U.S. at 802, n. 8, quoted in *Stowe Spinning*, 336 U.S. at 232). Moreover, the holding in *Republic Aviation* that an employer must permit employees to engage in union activity on break time (for which they are ordinarily paid) shows that, where necessary to effectuate the rights guaranteed by the Act, the Board may even require that organizational activity be permitted on company time (cf. Pet. 8)[8]. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424–425.

2. Review is not warranted in this case simply because the Second Circuit in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F. 2d 292, 305 (C.A. 2), certiorari denied, December 11, 1967, No. 684, this Term, declined to enforce a provision of a Board order giving the union access to the company bulletin boards (see Pet. 8–9). The Second Circuit's action in *Stevens* rests upon the premise—erroneous in the Board's view—that, since no unique problem of access had been shown, such a requirement could not be justified. While this consideration may be relevant in determining whether an unfair labor practice has been committed, it is irrelevant, in the Board's view, in ascertaining what constitutes an appropriate remedy for eradicating the effects of unfair labor practices which have already been established. In any event, there is no necessity for granting review in the instant case on this

[8] Since Vice-President Vandenberg addressed the employees on company time (*supra*, pp. 3–4), the Board did not act unreasonably in concluding that the Union required comparable conditions to negate the effects of Vandenberg's actions.

rather narrow question which, in the Board's view, was correctly decided by the court below.[9]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GEORGE B. DRIESEN,
Attorney,
National Labor Relations Board.

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[9] *National Labor Relations Board* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223 (C.A. 6), enforcing as modified, *H. W. Elson Bottling Co.*, 155 NLRB 714, does not require a different conclusion. There the court, although noting that it would enforce a Board order requiring the employer to permit a union to make a one-hour speech on company premises under "more aggravated circumstances" (379 F. 2d at 226), modified the order in that case so as to permit such access only if the employer again made "captive audience" speeches to its employees. In *Elson*, only 23 employees were in the bargaining unit, and no employees were discharged or laid off for joining the union. Here, on the other hand, about 350 employees were involved (J.A. 461–462), and the unfair labor practices were indeed "aggravated" (Pet. App. 14, n. 4). In short, *Elson* is distinguishable on its facts.

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